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No. 82-586

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

HAWAIIAN AIRLINES, INC.,
Appellant,
v.
DIRECTOR OF TAXATION
OF THE STATE OF HAWAII,
Appellee.

ON APPEAL FROM THE SUPREME
COURT OF THE STATE OF HAWAII

MOTION TO DISMISS OR AFFIRM

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November 25, 1982

TABLE OF CONTENTS

Page

QUESTION PRESENTED 1

ARGUMENT 2

1. Appellant has no right to appeal under 28 U.S.C. § 1257(2) because the Hawaii tax upheld is expressly permitted by federal statute 2
2. There is no federal question because this case does not involve the interpretation or application of a federal statute 3
3. This case stands on adequate state grounds because the question presented is a state question 4
4. Appellant presents nothing more than a "labeling" argument most recently rejected in *Complete Auto Transit, Inc., v. Brady* 6
5. This case is merely a new version of *Railway Express I* and *Railway Express II* 7
6. Congress did not intend that 49 U.S.C. § 1513 be applied to the Hawaii tax 9
7. Appellant's question is moot because Congress recently amended 49 U.S.C. § 1513 to show that permitted property taxes include the Hawaii tax 10

CONCLUSION 11

TABLE OF AUTHORITIES

Cases **Page**

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) 6.7

Evansville-Vanderburgh Airport Authority District v. Delta Airlines, 405 U.S. 707 (1972) 9

Railway Express Agency v. Virginia, 347 U.S. 359 (1954) 7

Railway Express Agency v. Virginia, 358 U.S. 434 (1959) 7

Statutes

Section 532 of the Tax Equity and Fiscal Responsibility Act of 1982, Title V — Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248, reprinted in [1982] Pamphlet No. 7 *U.S. Code Cong. & Admin. News* 380-381 10

28 U.S.C. § 1257(2) 2

49 U.S.C. § 1301 9

49 U.S.C. § 1305 9

49 U.S.C. § 1513 ..... passim

Hawaii Revised Statutes § 239-6 ..... passim

Legislative History

Senate Commerce Committee, Airport Development Acceleration Act of 1973, S. Rep. No. 93-12, 93d Cong., 1st Sess. (1973), reprinted in [1973] *U.S. Code Cong. & Admin. News* 1434 9

Standing Committee Report No. 850 on House Bill No. 57, Act 147, 1963 *Senate Journal* 950 (Hawaii) 8

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DEPARTMENT OF TAXATION
OF THE STATE OF HAWAII,
Appellee.

ON APPEAL FROM THE SUPREME
COURT OF THE STATE OF HAWAII

MOTION TO DISMISS OR AFFIRM

The Appellee Director of Taxation of the State of Hawaii, respectfully moves to dismiss or affirm the judgment of the Supreme Court of the State of Hawaii in this case.

QUESTION PRESENTED

Whether a Hawaii tax is a property tax or a gross receipts tax. If it is a property tax, it is expressly permitted by 49 U.S.C. § 1513(b); and if it is a gross receipts tax, it is expressly prohibited by 49 U.S.C. § 1513(a).

ARGUMENT

1. APPELLANT HAS NO RIGHT TO APPEAL UNDER 28 U.S.C. § 1257(2) BECAUSE THE HAWAII TAX UPHELD IS EXPRESSLY PERMITTED BY FEDERAL STATUTE.

49 U.S.C. § 1513 provides, in relevant part, as follows:

"§ 1513. *State taxation of air commerce*

. . . .

Permissible State taxes and fees

(b) Nothing in this section shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes . . ."

The Hawaii Tax Appeal Court held as follows:

"The Court finds that the PSC Tax is a tax on property expressly permitted by 49 U.S.C. § 1513(b)."

Jurisdictional Statement App. 30.

The Hawaii Supreme Court held as follows:

"The legislature has deemed the State levy 'a means of taxing the personal property of the airline or other carrier, tangible and intangible, including going concern value.' HRS § 239-6. We would not quarrel with this legislative characterization; the tax has some attributes of a property tax.

. . . .

"The decisions of the Tax Appeal Court are affirmed."

Jurisdictional Statement App. 22 - 24.

Appellant has no right to appeal because a state tax, expressly permitted by federal statute, is not repugnant to federal law.

2. THERE IS NO FEDERAL QUESTION BECAUSE THIS CASE DOES NOT INVOLVE THE INTERPRETATION OR APPLICATION OF A FEDERAL STATUTE.

Appellant claims that the question presented on appeal is whether a state tax is prohibited by a federal statute. The issue before this Court, in determining whether to accept this appeal, is whether Appellant's question requires this Court to determine the nature of a state tax (a state question) or to determine the nature of a federal prohibition (a federal question).

Appellant claims that in order to determine whether the state tax is prohibited, this Court must interpret the federal statute; and therefore, this case involves a federal question.

On the contrary, the federal statute is clear, unambiguous and presents no federal question. It expressly prohibits gross receipts taxes and expressly permits property taxes. 49 U.S.C. § 1513 provides as follows:

"§ 1513. *State taxation of air commerce*

Prohibition; exemption

(a) No State . . . shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; . . .

Permissible State taxes and fees

(b) Nothing in this section shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including

property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; . . ."

The federal statute could not be clearer in prohibiting gross receipts taxes and permitting property taxes. The only question is whether the state tax is a tax on property or on gross receipts. Since this question does not involve the interpretation of the federal statute, it is a state question, not a federal question.

For this reason, this appeal should be dismissed on the ground that it does not raise a federal question.

3. THIS CASE STANDS ON ADEQUATE STATE GROUNDS BECAUSE THE QUESTION PRESENTED IS A STATE QUESTION.

The question is whether the Hawaii tax is levied on property or on gross receipts. The federal statute has no relevance to the incidence of the state tax. The federal statute merely permits one tax and prohibits the other. Therefore, the nature of the state tax does not involve federal law.

The Hawaii Tax Appeal Court interpreted state law, not federal law, in determining whether the Hawaii tax is levied on property or on gross receipts.

> "The issue in this case is whether the PSC Tax is a tax on property or a tax on gross receipts. If the tax is on property it is permitted by 49 USC § 1513(b), and if the tax is on gross receipts it is prohibited by 49 USC § 1513(a).
>
> "The Court finds that the PSC Tax is a tax on property expressly permitted by 49 USC § 1513(b).
>
> "HRS § 239-6, in pertinent part, states that the tax is on personal property:
>
> 'The tax imposed by this section is a means of taxing the personal property of each airline or carrier,

tangible and intangible, including going concern value . . .'

"The legislative history leaves no doubt that personal property is the incidence reached:

'The purpose of this bill is to place the tax on public utilities, airlines, motor carriers, and contract carriers on a stronger basis from attacks of constitutionality on the commerce clause objections by clearly characterizing the tax as a property tax measured by gross income. Although the present public utility tax is in the nature of a property tax, it is not as clearly defined as a tax in lieu of property tax as is done in this bill.' S.C. Rep. 850 on H.B. No. 57, Act 147, S.L.H. 1963."

Jurisdictional Statement
App. 30.

The Hawaii Tax Appeal Court did not interpret the federal statute because it was clear, and discussion or interpretation was not necessary in order to decide the case.

The Hawaii Supreme Court discussed and dispatched with the federal arguments raised by Appellant because those arguments were not addressed in the Hawaii Tax Appeal Court. Although Appellant's federal arguments were insubstantial, the Hawaii Supreme Court addressed those arguments in order to prevent Appellant from appealing subsequent tax years on the ground that those were federal issues raised but not decided in the case. Appellant would benefit substantially by appealing subsequent tax years as the taxes would be deferred until collection.

The Hawaii Supreme Court addressed Appellant's arguments that: (1) the case requires the interpretation of the federal statute, (2) even if the federal statute expressly permits property taxes, its prohibition against gross receipts

taxes may be construed to prohibit property taxes as well, and (3) the federal interest in national aviation results in implied pre-emption of all state taxes on aviation.

Those federal arguments are clearly insubstantial and academic where the federal statute expressly and unambiguously sets forth two categories of taxes, one prohibited, the other not. The federal statute is clear, there is nothing to interpret.

For this reason, although the Hawaii Supreme Court addressed federal issues, the resolution of those issues was not material to the decision in the case and the decision was based entirely on state grounds.

4. APPELLANT PRESENTS NOTHING MORE THAN A "LABELING" ARGUMENT MOST RECENTLY REJECTED IN *COMPLETE AUTO TRANSIT, INC. v. BRADY.*

In *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977), this Court held that it would no longer hear the argument that a "magic word or label" could be applied to an otherwise valid tax in order to "disable an otherwise constitutional levy." Such arguments of form over substance serve "only as a trap for the unwary draftsman" and serve "only to distract the Courts and the parties from their inquiry into whether the challenged tax produced results forbidden." at 279, 284 and 285.

In this case, Appellant attempts to label an otherwise valid property tax as a gross receipts tax in order to invalidate the tax. This is exactly the type of "labeling" argument that this Court rejected in *Complete Auto Transit.*

5. THIS CASE SHOULD NOT BE HEARD BECAUSE IT IS MERELY A NEW VERSION OF *RAILWAY EXPRESS I* AND *RAILWAY EXPRESS II*.

In *Railway Express Agency v. Virginia*, 347 U.S. 359 (1954) ("*Railway Express I*") and *Railway Express Agency v. Virginia*, 358 U.S. 434 (1959) ("*Railway Express II*"), the issue was whether a Virginia tax was levied on property or on gross receipts. If the tax was levied on property, it was permissible, and if the tax was levied on gross receipts, it was a burden on interstate commerce prohibited by the Commerce Clause.

In *Railway Express I*, this Court held by a 5 to 4 majority that the tax was levied on gross receipts and was therefore prohibited by the Commerce Clause. In *Railway Express II*, this Court considered the same Virginia tax (measured at the same rate of 2-3/20% of gross income), which the Virginia legislature had redrafted to clearly state was a tax levied on property. This Court, by a 7 to 2 majority, held that the defective draftsmanship in the original Virginia statute had been cured. This Court noted that although an invalid tax could not be validated by a magic label, an otherwise valid levy could be invalidated by a magic label or by an ambiguity in draftsmanship which raised the slightest question as to whether the tax was levied on gross receipts or on some other prohibited incidence.

In *Complete Auto Transit, Inc. v. Brady*, supra, this Court held that it would no longer hear "magic label" arguments to invalidate a tax, but instead would consider only whether a tax, in actual operation and effect, is levied on a prohibited incidence. By this decision, this Court (1) ceased determining the nature of taxes on the basis of draftsmanship, and (2) avoided the problem of invalidating

a tax on draftsmanship, only to approve a redrafted version of the same tax with exactly the same economic substance and effect.

In this case, there is no question that the state tax is otherwise valid, except for the claimed ambiguity as to whether the tax is levied on property or on gross receipts. No one questions the fact that the State of Hawaii can levy a property tax against the Appellant, as the federal statute permits it and virtually all of Appellant's property is within the State of Hawaii. Jurisdictional Statement App. 29. If this Court invalidates the Hawaii tax, the Hawaii legislature need only amend the tax to clearly state that the tax is levied on property in order to validate the tax under 49 U.S.C. § 1513(b).

In fact, the Hawaii legislature has already amended the Hawaii tax to clearly state that the tax is a property tax, by an amendment in 1963 patterned after the *Railway Express II* amendment.

> "The purpose of this bill is to place the tax on public utilities, airlines, motor carriers, and contract carriers on a stronger basis from attacks of constitutionality on the commerce clause objections by clearly characterizing the tax as a property tax measured by gross income. Although the present public utility tax is in the nature of a property tax, it is not as clearly defined as a tax in lieu of property tax as is done in this bill." Standing Committee Report No. 850 on House Bill No. 57, Act 147, 1963 *Senate Journal* 950 (Hawaii).

This Court should not hear this case because (1) it presents only a question of draftsmanship which has little merit, and (2) invalidating the tax would only result in a tax windfall to the Appellant and the imposition of the same tax in the next legislative session.

6. CONGRESS DID NOT INTEND THAT 49 U.S.C. § 1513 BE APPLIED TO THE HAWAII TAX.

Congress enacted 49 U.S.C. § 1513 to prevent the levy of certain types of state taxes which exposed the interstate airlines to the risk of multiple state tax burdens. The prohibited taxes were those which did not require a substantial jurisdictional nexus and thus could easily be levied by more than one state upon the same airline. The enactment of 49 U.S.C. § 1513 was prompted by *Evansville-Vanderburgh Airport Authority District v. Delta Airlines,* 405 U.S. 707 (1972), where this Court held that every state in which an airline landed could levy a public facilities tax, head tax or gross receipts tax against the airline or its passengers without violating the Due Process or Commerce Clauses. Senate Commerce Committee, Airport Development Acceleration Act of 1973, S. Rep. No. 93-12, 93d Cong., 1st Sess. (1973), reprinted in [1973] *U.S. Code Cong. & Admin. News* 1434, at 1446.

In the present case, Appellant asks this Court to apply 49 U.S.C. § 1513 to a state tax imposed only on intrastate airlines. 49 U.S.C. § 1513 is technically applicable to the Hawaii tax because the federal statute applies to all state taxes imposed on airlines engaged in "interstate air transportation." 49 U.S.C. § 1301(10). Although Appellant flies only within the State of Hawaii, it is considered to be engaged in "interstate air transportation" for purposes of Civil Aeronautics Board jurisdiction because it flies over the international waters between the Hawaiian Islands. 49 U.S.C. § 1301(24) and § 1305(b)(2).

Congress did not intend that 49 U.S.C. § 1513 be applied to the Hawaii tax because the Hawaii tax does not pose the threat of multiple state tax burdens. The Hawaii tax is levied only on intrastate airlines which no other state has

jurisdiction to tax. Appellant does not fly interstate and virtually all of its property is located within the State of Hawaii. Appellant could never be subject to the multiple state tax burdens which 49 U.S.C. § 1513 was enacted to prevent, because, in fact, Appellant is an intrastate airline.

This Court should not decide any issue under 49 U.S.C. § 1513 in this case because this statute was never intended to apply to the Hawaii tax.

7. APPELLANT'S QUESTION IS MOOT BECAUSE CONGRESS RECENTLY AMENDED 49 U.S.C. § 1513 TO SHOW THAT PERMITTED PROPERTY TAXES INCLUDE THE HAWAII TAX.

49 U.S.C. § 1513 was amended on September 3, 1982 by section 532 of the Tax Equity and Fiscal Responsibility Act of 1982, Title V — Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248, reprinted in [1982] Pamphlet No. 7 *U.S. Code Cong. & Admin. News* 380-381. The amendment provides that the "property taxes" permitted by 49 U.S.C. § 1513(b) shall not include property taxes which levy a higher tax burden against airline property than against other similar commercial and industrial property. The amendment further provides that property taxes measured by gross receipts may levy a higher tax burden against airline property so long as the tax is wholly used for airport purposes. The amendment states that "this subsection [prohibiting discriminatory property taxes] shall not apply to an in lieu tax which is wholly utilized for airport and aeronautical purposes." 49 U.S.C. § 1513(d)(3).

The amendment to 49 U.S.C. § 1513 shows that the permitted "property taxes" include "in lieu taxes" or property taxes measured by gross receipts. The Hawaii PSC Tax is clearly such a tax. Therefore the question presented

by Appellant has been answered by Congress and is moot.

Although the amendment to 49 U.S.C. § 1513 does not apply to tax years before 1982, it should be noted that the Hawaii tax still qualifies as a permitted property tax under the new amendment. The Hawaii tax is a property tax measured by gross receipts which is used for general state purposes. The Hawaii tax, however, is clearly non-discriminatory as the tax is levied equally upon all Hawaii public service carriers. Hawaii Revised Statutes § 239-6 provides:

> "There shall be levied and assessed upon each airline a tax of four per cent of its gross income each year from the airline business . . . There shall be levied and assessed upon each contract carrier other than a motor carrier, a tax of four per cent of its gross income each year from the motor carrier or contract carrier business. The tax imposed by this section is a means of taxing the personal property of the airline or other carrier, tangible and intangible, including going concern value. . . ."

This case should be dismissed because the question presented is moot and any question arising under the amended statute is not ripe for adjudication.

CONCLUSION

For the reasons stated above, this appeal should either be dismissed or affirmed.

Respectfully submitted,

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of the State of Hawaii

November 25, 1982